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No. 02-1302

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE; VITO A. GAGLIARDI; DAVID LIVINGSTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE ALLAMUCHY TOWNSHIP BOARD OF EDUCATION; BOROUGH OF ALPHA BOARD OF EDUCATION; ANDOVER REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION; BOONTON TOWNSHIP BOARD OF EDUCATION; BOROUGH OF BARRINGTON BOARD OF EDUCATION; BOROUGH OF BLOOMINGDALE BOARD OF EDUCATION; CORBIN CITY BOARD OF EDUCATION; FOLSOM BOARD OF EDUCATION; GREAT MEADOWS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION; GREEN TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION; GREEN BROOK TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION; HOPE TOWNSHIP BOARD OF EDUCATION; LAUREL SPRINGS SCHOOL DISTRICT BOARD OF EDUCATION; LAVALLETTE BOARD OF EDUCATION; LITTLE FERRY BOARD OF EDUCATION; MERCHANTVILLE BOARD OF EDUCATION; WEYMOUTH TOWNSHIP BOARD OF EDUCATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When state law links together two school districts, so that the children of one district attend high school in another district, does the one person, one vote doctrine of the Equal Protection Clause of the Fourteenth Amendment require that voters of the sending district receive fair representation on the elected school board of the receiving district with respect to matters concerning the high school that the children from the sending district attend?

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INTEREST OF AMICI CURIAE[1]

The amici curiae are seventeen New Jersey school districts that, under New Jersey law, are each paired to another school district in a high school send-receive relationship. Children from the amici districts are sent to high schools in receiving districts, where they receive their ninth through twelfth grade education. These high schools are governed by the elected school boards of the receiving districts. The receiving district school boards have the power, inter alia, to determine the curricular and extracurricular programs of children from the sending districts; to control the appointment, transfer and removal of the teachers and administrators who provide educational services to children from the sending district; to authorize new capital construction to be utilized by the children from the sending districts; and to determine the tuition to be charged the taxpayers of the sending district to cover the costs of educating the children of the sending district. The tuition bill from the receiving district is financed by the property taxes paid by the residents of the sending district.

New Jersey law allows amici one seat on the board of education of their particular receiving district if the residents of the sending district constitute 10% or more of the combined total of the sending and receiving districts. *See N.J. Stat. Ann. § 18A-38-8.2 (1999)*. This tenth member may vote only on matters concerning the high school. In most of the send-receive relationships in which amici are involved,

1. This brief is filed with the written consent of all parties and those consents are being lodged herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than *Amici*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

however, the residents of the amici districts constitute considerably more than 10% of the combined total of residents of the amicus and its paired receive school district. So, too, the number of high school students from each amicus district is in most cases more than 10% of the combined total of high school students from the amicus district and its paired receive district. In two of the send-receive relationships in which amici participate, children from the amici districts constitute 50% or more of the total student population in the high school amici share with the receiving district. Yet, despite their larger share of the local population and of the high school population, they are still limited by New Jersey law to just one seat out of ten, and one vote out of ten, on the receiving district board when high school matters are addressed.

As a result of New Jersey's law, the voters of the sending district are underrepresented on the boards of education of the receiving districts. The parents and taxpayers of these amici districts are thereby denied fair representation in making educational policy for their high school children and in determining the tax-based cost of the high school education that they are financing. Like petitioner, they have a direct stake in the outcome of this litigation.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Court With an Important Opportunity to Clarify the Application of Constitutional Standards to the State Denial of Voting Rights Under Interlocal Agreements

New Jersey's send-receive arrangement for the provision of high school education is only one of countless thousands of interlocal contracts, joint services agreements, transfers of functions, and other special arrangements for the provision of important local government services. Today nearly all states authorize their local governments to enter into intergovernmental service agreements or to create special districts to provide services to areas both broader and smaller than existing local general purpose local governments. *See, e.g.*, Sands & Libonati, *Local Government Law* §§ 6.01-6.09 (2002); Dale Krane, Platon Riggs, Melvin B. Hill, Jr., *Home Rule in America: A Fifty-State Handbook* 489 (2001); U.S. Advisory Commission on Intergovernmental Relations, *State Laws Governing Local Government Structure and Administration* 9 (1993).

These arrangements promote the flexible provision of services, enable local governments to adapt to changes in population, permit the realization of economies of scale, facilitate the spreading and sharing of costs across multiple localities, and allow small local units to option necessary services from larger governments. The authority to contract for basic services has made it easier for new local governments to form, *see, e.g.*, Gary Miller, *Cities by Contract* (1981), and for older small localities to maintain their independent existence. Interlocal contracts permit the regionalization of services without imposing regional

governments. *See, e.g.*, Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. Rev. 190 (2001). These arrangements have certainly benefitted many of the amici districts. As relatively small districts, many of these districts would have found it financially burdensome to establish and maintain their own high schools. The send-receive arrangement has enabled them to share costs and benefits with other districts. The receive districts also benefit by enabling them to spread the many fixed costs of their high schools over a broader tax base.

Although often beneficial to local residents, interlocal agreements and similar arrangements for the regional pooling of services and costs raise important questions of representation of and accountability to local residents. Residents may lose direct democratic control when services are provided by another government, and the equal representation may be undermined when important services are provided by political bodies that do not abide by the one person, one vote principal. *See, e.g.*, *Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885 (W.D. Wash. 1990); *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

This Court has repeatedly affirmed the importance of flexibility and experimentation in local governance. "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions." *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967). The states enjoy "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

But experimentation with local government structure remains subject to the Constitution, and when local governments are elected, strict scrutiny of state legislation allocating the franchise and representation on local units is required. *See, e.g., Avery v. Midland County*, 390 U.S. 474, 485-86 (1968); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Board of Estimate, supra.*

This case provides an important opportunity to clarify the tension between recognition of the value of interlocal agreements and regional innovations in local service delivery and the ongoing importance of protecting the right to vote. The New Jersey high school send-receive relationship differs in one significant way from many interlocal agreements. Although nominally a product of voluntary contract, New Jersey's send-receive arrangements and the role of the sending school districts in basic decision-making concerning their shared high school are strongly determined by state law rather than the consent of the parties.

First, the rule limiting the send district to at most one representative on the board of the receiving district when high school matters are determined is the result of state law, not private negotiation. *See N.J. Stat. Ann. § 18A:38-8.2.* The sending and receiving districts lack any authority to negotiate for greater representation of the sending districts on the receiving district boards.

Second, although the send-receive arrangements begin as a result of a voluntary agreement, they may be forced by the state to continue long after one or the other party has sought to end the arrangement. Under New Jersey law, a send-receive relationship may not be ended, even after the expiration of the original interdistrict contract, without the consent of the state commissioner of education. Prior to

seeking the commissioner's consent, the district desiring to terminate the arrangement must first "prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by the pupils of each of the districts, and the effect on the racial composition of the pupils of each of the districts." *N.J. Stat. Ann. § 18A:38-13.* In reaching a decision, the commissioner must also consider "all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." *See id.*

Plainly, a sending district has no right to end its relationship with a receiving districts. Indeed, many such relationships continue long past the expiration of the contracts linking the districts. The process of separation is costly and there is no guarantee that a district desiring to terminate will succeed. *See, e.g., Board of Education of Township of Branchburg v. Board of Education of Borough of Somerville*, 173 N.J. Super. 268, 414 A.2d 259 (N.J. App. Div. 1980) (affirming decision of the State Board of Education affirming action of State Commissioner of Education denying Branchburg's request to withdraw from send-receive arrangement with Somerville). Indeed, it appears that due to the financial impact of the loss of the sending district's tuition payments for the receiving district, the state commissioner of education has never allowed a send-receive relationship to be terminated when children from the sending constitute more than 25% of the total send-receive population of the receiving district's high school. *See English v. Board of Education of Town of Boonton*, 135 F. Supp. 2d 588, 592 (D.N.J. 2001), *rev'd*, 301 F.3d 69 (3d Cir. 2002).

Many districts do not even try to terminate send-receive relationships but, instead, accept the fact that they are locked into a virtually permanent relationship with another district.

The state's practice effectively locks in those districts which provide a significant fraction of the children and tuition dollars in receiving district high schools into the send-receive relationship. As a result, the districts with the greatest stake in the governance of the receiving high schools are both the most discriminated against by the combined effect of the state's law limiting representation on receiving district school boards and the state's practice of denying the opportunity to end the relationship.

The undemocratic denial of fair representation to sending districts at issue in this case is, thus, largely the result of state laws and administrative practices rather than the terms of the send-receive agreements negotiated by the school districts.

This case, therefore, provides the Court with the opportunity to clarify that, notwithstanding the considerable leeway states and local governments ought to enjoy to develop flexible and innovative forms of service delivery, constitutional requirements continue to apply to state laws and practices that mandate the denial of voting rights under interlocal agreements.

II. By Rejecting the Claim of Sending District Parents to Fair Representation in the Governance of the High School that Their Children Attend, the Decision of the Court of Appeals is in Tension with Decisions of this Court Requiring Strict Judicial Scrutiny of State Laws that Deny Equal Voting Rights in School Board Elections

The central fact of this case, not challenged by respondent or denied by the court of appeals, is that the high school operated and maintained by the "receiving district" is the high school in which the children of the "sending district" receive their ninth through twelfth grade educations, and it is also the high school financed by the high-school portion of the property taxes paid by the residents of the send district.

This Court has consistently held that when school boards are locally elected, the highest degree of constitutional protection attaches to the right to vote in school board elections. Statutes denying the franchise to otherwise qualified voters will be subject to "a close and exacting examination" with any exclusion from the franchise "necessary to promote a compelling state interest." *Kramer*, 395 U.S. at 626-27. So, too, the apportionment of votes on the governing body of a school board elected by vote is subject to the strict requirements of the "one person, one vote" doctrine of the Equal Protection Clause of the Fourteenth Amendment. *See Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970). As Justice Powell once observed in explaining why school board elections are marked by the strongest constitutional protection of the right to vote while most other special district elections do not, "[t]hese cases [*Kramer* and *Hadley*] reflect

the Court's judgment as to the unique importance of education among the functions of modern local government." *Ball v. James*, 451 U.S. 355, 372 n. 1 (1981) (Powell, J., concurring).

School board elections are of constitutional significance because the local democratic control they provide is "essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). Voting in local school board elections "affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.* at 742, quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973). Even when adopted by a state legislature that is itself democratically elected and properly apportioned, laws that infringe on the right to vote in school board elections are unconstitutional. *Kramer*, 395 U.S. at 628.

By limiting voters in a sending district to no more than one seat on the board of a receiving district when high school matters are at issue, regardless of how great the sending district's share is of the combined population of the sending and receiving districts, New Jersey's law is inconsistent with this well-established constitutional principle of democratic representation in school board elections. In districts with more than 10% of the combined population, New Jersey effectively denies sending district residents their fair opportunity to participate in high school decision-making and to structure the high school program to fit their local needs.

In sustaining the limited representation of sending district voters the Third Circuit relied on *Holt*, *supra*. *See Board of Education of the Township of Branchburg v. Livingston*, 312 F.3d 614, 621-24 (3d Cir. 2002). *See also English v. Board of Education of the Town of Boonton*, 301 F.3d at 77-82. In *Holt*, this Court upheld an Alabama law enabling certain cities to enjoy limited extraterritorial authority in a police jurisdiction three miles outside the city limits without providing residents of the police jurisdiction a vote in city elections. The Court found that strict judicial scrutiny of laws denying the right to vote in local elections did not apply to the extraterritorial authority at issue in *Holt*.

Holt did not rule that all extraterritorial cases were exempt from strict judicial protection of the right to vote. *Holt* clearly indicates the "indirect extraterritorial effects" – even substantial effects – of local government actions on non-residents do not give such nonresidents the right to vote in local elections. 439 U.S. at 69. So, too, *Holt* holds that nonresidents have no right to vote in the elections of a municipality that has a direct but limited authority over those nonresidents. That was the situation in *Holt*. The City of Tuscaloosa could enforce certain police and sanitary regulations and collect from businesses in the police jurisdiction only one-half the license fee chargeable to similar business conducted within the city limits. *See id.* at 61-62.

Holt, however, specifically noted that Tuscaloosa's extraterritorial powers did not include the "vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses." *Id.* at 73 n.8. The Court stressed that the case did not involve "a situation in which a

city has annexed outlying territory in all but name, and is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits." *See id.* On this point, *Holt* cited *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975), which held that a South Dakota law enabling the elected officials of an "organized county" to exercise "substantial power over the affairs of individuals" living in an adjacent "unorganized county" without giving "unorganized county" residents the vote in organized county elections was unconstitutional.

The Court's citation to *Little Thunder* suggests that even after *Holt*, when one local government unit wields substantial and direct authority over nonresidents, those nonresidents are entitled to vote and to representation under the one person, one vote doctrine in the elected body that runs the government that exercises extraterritorial power.

With respect to their shared high school, the relationship between sending and receiving school districts in New Jersey clearly resembles the relationship between organized and unorganized counties in *Little Thunder*. The receiving district has complete authority over all issues relating to the high school education of children from the sending district, including curriculum, extracurricular activities, school facilities, and the hiring, transfer and firing of high school teachers and administrators. So, too, the receiving district has the power to impose a tuition charge on the sending district, which is paid out of sending district property tax revenue. In effect, the receiving district has the power to tax residents of the sending district.

Given the broad powers the receiving districts have with respect to the high school students and taxpayers of the sending districts, the sending districts are effectively part of the receiving district for high school purposes. Sending district residents are, for high school purposes, de facto residents of the receiving district with which they are paired. They should receive constitutionally fair representation on the receiving district's governing board.

The Third Circuit dismissed the significance of the substantial and direct powers the receiving districts have over sending district students and taxpayers by stressing that the receiving districts have power only with respect to high school education and not the complete K-12 education program. As a result, "the receiving district was not exercising the same governmental powers over the sending district as it does over its own residents." *See Branchburg, supra*, 312 F.3d at 621.

But this Court has never conditioned strict scrutiny of discriminatory rules limiting the right to vote on a finding that the elected officials exercise full governmental powers over those denied the equal right to vote. In *Board of Estimate v. Morris*, *supra*, for example, this Court upheld the application of the one person, one vote doctrine to the New York City Board of Estimate. Although the Board lacked general law-making power for New York City, it did enjoy "considerable authority" over a "significant range functions" and was, thus, subject to the one person, one vote doctrine. *See id.* at 694, 696.

Implicit in the Third Circuit's holding was a notion that the importance of a 9-12 program is so dwarfed by the importance of a K-12 program that fair representation is not

required. Petitioners submit that high school education, standing alone, is critically important and should invoke equal protection strict scrutiny. For example, in *Hadley, supra*, this Court held that the one person, one vote doctrine applied to a junior college district which presumably provided only a two-year, optional, degree program. This involved far less significant government authority over the junior college district than the control over a four-year, mandatory high school education wielded by New Jersey's receiving districts. Nonetheless the Court held that the trustees of the junior college district "perform important governmental functions within the districts" and that "these powers are general enough and have sufficient impact throughout the district to justify the conclusion" that one person, one vote applies. *Hadley*, 397 U.S. at 54. So, too, in this case, the receiving districts plainly perform important governmental functions with respect to the sending districts and their powers over education and to demand a tax-financed payment have sufficient impact on the receiving district to require the application of one person, one vote.

School districts vary in the number of educational grades they cover. Some teach only kindergarten through eighth grade; others teach just ninth through twelfth grade; still others offer a K-12 program. The right to vote in, and the application of the one person, one vote doctrine to, school district elections has never been contingent on a school district providing a full K-12 program. Although this Court has never considered the right to vote in a 9-12 high school district, it has sustained the application of the one person, one vote doctrine to a junior college district. *See Hadley, supra*. Other federal and state courts have held that the one person, one vote doctrine applies to school districts that offer simply a high school program and not a full K-12 education.

See, e.g., Baker v. Regional High School Dist. No. 5, 520 F.2d 799 (2d Cir. 1975); *Township of Marlboro v. Board of Education of Freehold Regional High School*, 992 F. Supp. 756 (D.N.J. 1998); *Barnes v. Board of Directors, Mt. Anthony Union High School District (No. 14)*, 418 F. Supp. 845 (D. Vt. 1975); *Township of Franklin v. Board of Education of North Hunterdon Regional High School*, 74 N.J. 345, 378 A.2d 218 (N.J. 1977).

This is not a situation in which receiving districts provide sending districts with limited services, like opportunities to participate in athletic teams or the high school band, or certain esoteric subjects, or specialized services. Instead, the receiving districts are providing the sending districts with a complete high school education. Surely the importance of a high school education in the development of local communities – and the impact of financing that education on local taxpayers – justifies the application of the one person, one vote doctrine to the boards of education that control high schools.

With respect to high school education, the powers of the receiving district over the sending district are identical to the powers of the receiving district within its own borders. The power to determine the curriculum, teaching staff, facilities, and costs of a high school program is a substantial one. When that power is controlled by an elective body, the laws that determine who may vote for that body and which discriminate among the parents and taxpayers directly and substantially affected by that elected body must be subject to strict judicial scrutiny and invalidated unless necessary to a compelling state interest. No such compelling interest has been advanced in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari submitted by the Board of Education of the Township of Branchburg should be granted.

Respectfully submitted,

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